IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 311 of 1981

with

CROSS OBJECTION No 336 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

VISHNUBHAI M PATEL

Appearance:

1. First Appeal No. 311 of 1981

MR K.C. SHAH, ASSTT.GOVERNMENT PLEADER for Petitioner

MR G.T. DAYANI with MS MAYA N BHAVNANI for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE C.K.BUCH

Date of decision: 03/03/99

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

The State of Gujarat challenges the judgement and

decree passed by the learned Third Joint Civil Judge (Senior Division), Surat on 11th July, 1980 in Special Civil Suit No. 25 of 1977, partly decreeing the suit of the respondent for a sum of Rs. 1,68,028.

2. The respondent had sued the appellant for Rs.3,63,526 for breach of contract, on an allegation that the appellant did not hand over the possession of the site for the work of constructing flood embankment on river Tapi, which was undertaken by the respondent. Pursuant to the work order dated 16.11.1972, though the work was to be completed within 24 months i.e. on or before 15.11.1974, only a part of the site was handed over in which the construction work was completed by the respondent. Because the remaining site was not entrusted, work worth Rs. 17 lacs remained unexecuted, the site was not handed over till 15.11.1974 or even thereafter. Damages by way of loss of profit on the unexecuted work to the tune of Rs. 3,40,000 were therefore claimed and a refund of security deposit of Rs. 16,525 as well as payment of Rs. 7,000 for the work of rolling and watering were claimed. The Suit was instituted after giving a notice under Section 80 of the Civil Procedure Code.

3. The appellant contested the suit by filing written statement Ex.11, contending that as per clause 39 of the agreement, the respondent contractor was not entitled to claim any compensation for any delay in acquisition of land and therefore, even if the State was not in a position to hand over the possession of the land on which the work was to be done, no claim for loss of profit in respect of such work, can be made by the respondent. It was also contended that the respondent was not prepared to fulfil the obligations under the contract and though some more land was available for further work and the respondent was informed about it on 13.11.1975, he did not respond and failed to carry out the work. It was also contended that the security deposit was paid as per the terms of the agreement and it was deducted from the current bills. The appellant denied that the contract came to an end on 15.11.1974 or 13.11.1975.

4. The trial Court, on the basis of the material on record, came to a finding that the present appellant defendant was under an obligation to hand over the site of the work alongwith work order or soon thereafter as and when demanded and that it had failed in handing over the work site, as a result of which the respondent could not carry out the construction work worth Rs. 17 lacs on

the remaining site, which was required to be handed over. It was therefore, held that the appellant - defendant had committed breach of contract and that the contract had come to an end. As regards the loss of profit, the trial Court held that the respondent was entitled to claim profit at the rate of eight and half per cent on Rs. 17 lacs, which came to Rs. 1,44,500. The claim as regards security deposit and payment for rolling and watering work was accepted.

5. The respondent plaintiff has filed counter claim of Rs. 68,775 in this First Appeal. However, the learned Counsel appearing for the respondent plaintiff has stated that the respondent does not press for the counter claim and therefore, we are not required to consider the same on merits.

6. The learned Counsel appearing for the appellant strongly contended that in view of clause 39 of the tender agreement, which is at Ex. 31, no compensation was payable for any delay caused in the starting of the work on account of acquisition of any land. It was submitted that there was evidence to show that the acquisition proceedings were pending and therefore, the State Government could not get the possession of the land, which was required to be handed over to the respondent for further work. It was submitted that the respondent ought to have waited for the site being handed over to him, but, instead, he committed a breach of the contract by leaving the site within the extended period of the contract. It was submitted that by letter Ex.47, the period of completion of the work was extended till 30th December, 1975, while the respondent had left the site of the contract much prior to that, in the year 1973. It was therefore submitted that there was no breach of the contract on the part of the State Government and no decree could have been passed in favour of the respondent.

7. There is no dispute about the fact that respondent was issued work order dated 15.11.1972 and that he was required to complete the work within 24 months as stipulated in the contract. There is also no dispute about the fact that the respondent had completed the work over the site which was actually handed over to him and it is only on the site which was not handed over to him that the work remained to be executed. The respondent - plaintiff in his deposition Ex.30 has stated that he was given possession of the land on which he carried out the work to the extent of Rs. 5 lacs and he could not execute the remaining work as the appellant

defendant failed to hand over possession of the site on which it was was to be done. The Deputy Engineer of the appellant in his deposition at Ex.72 has stated that possession of the site was to be handed over as and when the Department was able to get the same. According to him, acquisition proceedings were going on in respect of the site on which the work was to be done at the time when the agreement Ex. 31 was entered into between the parties. He has stated that during his stay at Surat, only three and a half to 4 K.M land was acquired and possession was handed over to the respondent. He has admitted that till he was at Surat, possession of the entire 10 K.M land was not handed over to the respondent and that he did not know when the Department acquired the possession of the remaining land. The Executive Engineer of the appellant, who deposed at Ex. 73 has stated that while he was at Surat from 1.6.1974 to June, 1978, efforts were going on for getting the possession of the remaining land and that prior to his taking over charge, work of 4 K.M was done by the respondent. He has stated that the land owners had filed a Suit and obtained injunction against taking over the possession of the land and that when the suit was compromised, possession of one K.M of land was acquired by the appellant. However, no evidence was produced in support of this assertion. In his cross-examination, this witness has admitted that people did not allow the respondent to do work in the said one K.M stretch of land. He admitted that on 12th April, 1976 the appellant did not have possession of 5 K.M land, which were yet to be acquired. The trial Court therefore, rightly came to a finding on the basis of the deposition of the appellant's own witness that it was crystal clear that on 12th April, 1976 the respondent was not given possession of 5 K.M of land. It was found that on 15.11.1972 when the works order was given, the entire site was not handed over to the respondent. We agree with the finding of the learned Judge which is arrived at on the basis of the materials on record. This finding has significance in context of clause 39 on which reliance has been placed on behalf of the appellant and which reads as under:-

> "Clause 39.- No compensation shall be allowed for any delay caused in the starting of the work on account of any acquisition of land (or?) in the case of clearance works, or any delay in according sanction to estimates."

The clause clearly contemplates that compensation will not be claimed if delay is caused in the starting of the work on account of any acquisition of land. In other

words, if the work cannot be started due to non-acquisition of land, the contractor cannot claim compensation. The words `starting of the work' have relevance to the commencement of the work and the clause cannot be so read as to mean that once the work is started on a portion of land, which is handed over, the handing over of the remaining site can be prolonged for an indefinite time and that the contractor would remain bound for ever to wait until such time that the possession might be handed over to him. The clause clearly has to be read in context of the period in which the contract was to be performed i.e. 24 months from the date of works order or even if the extended time is taken in to account till 30.12.1975, in view of the letter Ex.47. It has been found that the State did not acquire possession of the remaining site even by 12.4.1976. In this view of the matter, the State clearly failed in handing over the possession of the site in question as per the terms of the contract for completion of the work within the stipulated time or even within the extended time. The finding is that the appellant committed breach of contract which is borne out from the record. The contractor had completed the work which was entrusted to him and since the remaining site was not handed over and could not have been handed over as stipulated in the agreement, obviously he could not do the remaining work, as a result of the lapse on the part of the appellant. The respondent was therefore, entitled to claim compensation for breach of contract.

8. As regards the quantum of compensation, the learned Assistant Government Pleader appearing for the appellant has not been able to show as to how it is excessive. The loss of profit is assessed only at eight and a half per cent. The Supreme Court in Mohd Salamatullah Vs. Government of Andhra Pradesh, reported in 1977 S.C 1481 restored the assessment of profit at 15 per cent made by the trial Court, which was reduced by the High Court to 10 per cent of the contract price. Referring to this decision and on the basis of the facts established, the trial Court came to a finding that it would be in fitness of things if the loss of profit is worked out at eight and half per cent on the remaining work, which was admitted to be worth Rs. 17 lacs. We find that the trial Court has worked out the profit on a rational basis and there is no warrant for any interference on that count. There was no other contention raised before us.

The appeal is therefore, dismissed with no order as to costs. The cross-objections are also dismissed as

not pressed.
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*/Mohandas